IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

CRL.A.No. 942 of 2003(B)

CC.124/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, THRISSUR

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APPELLANT/COMPLAINANT

SIVAPRASAD.T.K. S/O. KUMARAN,
M.G.KAVU, KILLANNUR, THRISSUR.

BY ADV. SRI.P.VIJAYA BHANU
SRI.TONY MATHEW

RESPONDENTS/ACCUSED/STATE:

1. K.C.BABU S/O. CHENNAN, KOLANGATTUKARA, CHOOLISSERY, THRISSUR, NOW WORKING AS D.P.S.SECTION, F.C.I. MULANKUNNATHUKAVU, THRISSUR.

2. THE STATE OF KERALA, REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRIP.G.SURESH
BY PP SRI.THOMAS JOHN AMBOOKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.P. Balachandran, J.

Crl.A.No. 942 of 2003

JUDGMENT

The appellant is the complainant in a complaint filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'), he being aggrieved by the acquittal of the first respondent/accused of the said offence under Section 255(1) Cr.P.C.

2. The appellant filed complaint against the first respondent complaining of commission by him of an offence punishable under Section 138 of the Act on the allegation that he advanced a loan of Rupees one lakh to the first respondent on 13.8.1997 and a further amount of Rs.75,000/- on 15.9.1999; that on demand being made for return of the amount, the first respondent issued Exhibit P1 cheque dated 15.10.1999 for an amount of Rs.1,75,000/-; that on the cheque being forwarded

for collection, it was dishonoured for reason of insufficiency of funds in the account of the first respondent to honour the same; that consequent thereon, statutory notice was issued to the first respondent on 29.10.1999 and that was accepted by him on 16.11.1999 under Exhibit P5 postal acknowledgment card, but that he has not cared to pay up the amounts covered by Exhibit P1 cheque either within the statutory period or ever thereafter and thereby he committed an offence punishable under Section 138 of the Act.

3. On being questioned, reading over the particulars of the offence, the first respondent pleaded not guilty and consequently a trial of the case was conducted by the court below. On the side of the complainant, the complainant himself gave evidence as PW1 and got marked Exhibits P1 to P6. On the complainant closing his evidence, the first respondent was questioned under Section 313 Cr.P.C. Thereupon, he generally denied all incriminating circumstances appearing in evidence against him and

maintained that he is innocent. On the defence side DW1 was examined and Exhibits D1 to D4 were marked.

4. According to first respondent, he had borrowed only an amount of Rupees one lakh from the complainant and he had paid back that amount in instalments. When the amount was borrowed, he had given a signed blank cheque leaf and a signed blank paper. Those documents were not returned, despite demand after repayment of the amount, the complainant claiming more amounts by way of interest. According to him, the cheque has been made up on the blank signed cheque leaf entrusted with the appellant/complainant by way of security. It is also his case that while making payments in instalments, the appellant used to issue receipts and those are Exhibits D1 to D4.

5. The court below, considered the evidence adduced as aforesaid and found that Exhibit P1 cheque was not being issued in discharge of a legally enforceable debt, but was being issued only by way of security; that no amount is due

thereunder to the appellant and consequently, found the first respondent not guilty and acquitted him of the offence under Section 138 of the Act under Section 255(1) Cr.P.C. Hence, this appeal.

6. It is contended before me by the learned counsel for the appellant that acquittal of the first respondent/accused was on the sole ground that he has produced Exhibits D1 to D4, of which, one alone was admitted by the appellant and that too by slip of the tongue and that, in fact, Exhibits D1 to D4 are not receipts issued by the appellants and are not properly proved either; that the first respondent has no case as to who has written in Exhibits D1 to D4 receipts and that the court below, on the basis of the unreliable evidence of DW1, has accepted Exhibits D1 to D4 in proof of discharge of debt of Rupees one lakh and finding that Exhibit P1 cheque is not one issued in discharge of a legally enforceable debt; that the said finding is illegal and improper and that the appellant has filed Crl.M.A.No.10645/06, seeking

leave to have Exhibits D1 to D4 being forwarded for expert opinion as regards the signatures therein.

7. Exhibits D1 to D4 are dated 8.1.1999, 30.7.1998, 7.7.1998 and 6.4.1998 respectively. In all the receipts, reference is made to an amount of Rupees one lakh borrowed from the appellant. According to the first respondent Exhibits D1 to D4 are executed by the appellant, acknowledging receipt of payments in instalments in discharge of debt of Rupees one lakh availed of from him. Exhibit D1 is the last of the series. It contains a statement that no further amounts are due to the appellant from the first respondent and an undertaking to the effect that the cheque entrusted by the first respondent with the appellant would be returned. This is dated 8.1.1999. Exhibit P3 is the copy of notice issued by the appellant to the first respondent consequent on dishonour of Exhibit P1 cheque for reason of insufficiency of funds in the account of the first respondent. This is dated 29.10.1999. Exhibit P6 is the reply thereto and it

is dated 16.11.1999. In Exhibit P6 no reference is made to Exhibits D1 to D4. But, a contention is raised that the debt availed of is only Rupees one lakh; that, that is repaid by payment of Rs.1,01,500/- and that one Sadanandan and one P.A.Syed are persons having direct knowledge thereof. No mention at all is made in Exhibit P6 as regards the four receipts (Exhibits D1 to D4) and of the alleged undertaking in Exhibit D1 that the cheque leaf delivered to the appellant would be located and returned. It has necessarily to be presumed under the circumstances that Exhibits D1 to D4 were not documents in the possession of the first respondent at the time of issuance of Exhibit P6 reply notice. Exhibits D2 to D4 were being marked by the court below without proof, observing that those are marked subject to proper proof, when PW1 admitted the signature in Exhibit D1. But, after admitting his signature in Exhibit D1, the appellant has stated that he happened to admit the signature as being his signature by mistake without

properly seeing the signature in the receipt.

8. PW1 has also denied the suggestion that while lending Rupees one lakh, he has received a signed blank cheque leaf as also a pro-note from the first respondent and that Exhibit P1 cheque was being brought into existence and the complaint was being filed as dispute arose with respect to payment of money by way of interest. The court below, accepting Exhibit D1 as genuine, has found that when there is a reference to a cheque in Exhibit D1, it could only be the cheque obtained from the first respondent at the time of advancing Rupees one lakh and that there being no other cheque issued to the appellant, Exhibit P1 cheque dated 15.10.1999 must be the one made up on the blank cheque leaf given signed by the first respondent to the appellant and referred to in Exhibit D1 dated 8.1.1999. All the same, the court below has not adverted to the aspect that there is no reference at all in Exhibit P6 reply notice regarding existence of Exhibits D1 to D4 receipts

issued by the appellant.

9. Prudence dictates that there should be reference to Exhibits D1 to D4 in Exhibit P6, especially when the first respondent was very careful to mention about Sadanandan and P.A.Syed, who according to him, have the knowledge of discharge of debt due to the appellant. However, out of the two persons mentioned, Sadanandan alone was examined and he is DW1. It is not clear from the testimony of DW1 as to how he happened to be a witness for all payments made under Exhibits D1 to D4. However, he is not a witness in any of the Exhibits (Exhibits D1 to D4). DW1 is one who is employed in Food Corporation of India and it is not known how he accompanies the first respondent whenever he makes payment to the appellant as stated by him. DW1 pleads ignorance as to in whose handwriting is Exhibits D1 to D4. PW1 has denied of having any knowledge as to in whose handwriting Exhibits D1 to D4 are written. The first respondent has also no case as to in whose handwriting

Exhibits D1 to D4 are written. The only signature admitted by the appellant, as PW1, is the one in Exhibit D1 and he has denied even that subsequently. There was actually no proof furnished as regards the signatures in Exhibits D1 to D4 and Exhibits D2 to D4, which are marked subject to proper proof, remain not proved even now. It is on the basis of the comparison of the signatures with the signature of the appellant in the vakalat, in the complaint, etc. the court below found that the signatures in Exhibits D1 to D4 are all that of the appellant. It is in that view that the learned Magistrate has come to the conclusion that Exhibit P1 cheque is not one issued in discharge of a legally enforceable debt, but is one issued blank by way of security and that Exhibit P1 cheque was being made up on that cheque leaf. The court below has not appreciated the rival contentions of the parties in the proper perspective and it appears to have been mislead assuming that Exhibits D1 to D4 are documents duly executed by the appellant.

However, apart from observing that there is no proper proof for execution of Exhibits D1 to D4, it abstained from making any observation regarding the genuineness of Exhibits D1 to D4, as the appellant himself has filed Crl.M.A.No.10645/06 to have those receipts forwarded for expert opinion on the signatures therein. The acquittal of the first respondent by the court below deserves to be set aside, as the learned Magistrate has not considered the case in the proper perspective, as discussed above.

10. In the circumstances of the case, I am of the view that this case has to be remanded back to the court below, setting aside the order of acquittal with direction to the learned Magistrate to dispose of the case afresh after giving an opportunity to the appellant/complainant to have expert opinion obtained on comparison of the signatures in Exhibits D1 to D4 by forwarding them to a Handwriting Expert at the expense of the appellant himself.

11. In the result, I set aside the order of acquittal of the first respondent and remand the case back to the court below. The learned Magistrate shall dispose of the case afresh, after affording an opportunity to the appellant to have expert opinion obtained at his expense, as regards genuineness of the signatures in Exhibits D1 to D4. The learned Magistrate shall also permit both sides to adduce further evidence, if any, they want to adduce in the matter, after obtaining expert opinion as regards the signatures in Exhibits D1 to D4. Parties shall appear in the court on 15.3.2007.

This appeal is disposed of as above.

6th February, 2007 (K.P.Balachandran, Judge)

tkv

K.P.Balachandran, J.

Crl.A.No.942 of 2003

JUDGMENT

6th February, 2007